

FEDERAL CIRCUIT COURT OF AUSTRALIA

ASF17 v MINISTER FOR IMMIGRATION

[2017] FCCA 2498

Catchwords:

MIGRATION – Application for Safe Haven Enterprise Visa – review of decision of delegate of the Minister – excluded fast track applicant – whether applicant satisfied criteria for grant of visa – whether delegate erred by applying its finding under s.5J(6) of the *Migration Act 1958* (Cth) to the criterion in sub-s.36(2)(aa) of the Act – provision of bogus document – whether reasonable explanation was provided for bogus document – whether delegate was satisfied explanation for bogus document was reasonable – delegate’s decision affected by error – Court’s discretion exercised to refuse to grant relief – application dismissed.

Legislation:

Migration Act 1958 (Cth), ss.5, 5AA, 5AH, 5H, 5J, 36, 46A, 65, 91R, 91WA, 338, 411, 473BB, 473BC, 473BD, 473CA, 476, 500, pts.5, 7 and 7AA

Cases cited:

AIB16 v Minister for Immigration & Border Protection [2017] FCAFC 163
Avon Downs Pty Ltd v Federal Commissioner of Taxation (1949) 78 CLR 353; [1949] HCA 26
BGM16 v Minister for Immigration & Border Protection [2017] FCAFC 72
George v Rockett (1990) 170 CLR 104; [1990] HCA 26
Minister for Immigration & Citizenship v SZJGV (2009) 238 CLR 642; [2009] HCA 40
Minister for Immigration & Multicultural Affairs v Yusuf (2001) 206 CLR 323; [2001] HCA 30
R v Connell; Ex parte Hetton Bellbird Collieries Ltd (1944) 69 CLR 407; [1994] HCA 42
Re Refugee Review Tribunal; Ex parte Aala (2000) 204 CLR 82; [2000] HCA 57
Sun v Minister for Immigration & Border Protection (2016) 243 FCR 220; [2016] FCAFC 52
SZBYR v Minister for Immigration & Citizenship (2007) 81 ALJR 1190; [2007] HCA 26

Applicant: ASF17

Respondent: MINISTER FOR IMMIGRATION &
BORDER PROTECTION

File Number: PEG 99 of 2017
Judgment of: Judge Smith
Hearing date: 16 August 2017
Date of Last Submission: 28 September 2017
Delivered at: Sydney and Perth by video-link
Delivered on: 2 November 2017

REPRESENTATION

The applicant appeared in person.

Counsel for the Respondent: Mr P Macliver

Solicitors for the Respondent: Australian Government Solicitor

ORDERS

(1) The application be dismissed.

(i)

FEDERAL CIRCUIT COURT

OF AUSTRALIA

AT PERTH

PEG 99 of 2017

ASF17

Applicant

And

MINISTER FOR IMMIGRATION & BORDER PROTECTION

Respondent

REASONS FOR JUDGMENT

1. This is an application for judicial review of a decision of a delegate of the Minister for Immigration and Border Protection made on 16 January 2017. The delegate’s decision was to refuse to grant the applicant a protection visa. The delegate also found that the applicant was an “excluded fast track applicant” within the meaning of the *Migration Act 1958* (Cth) (**Act**).
2. There are two broad issues in the proceedings:
 - a) first, whether the applicant is an “excluded fast track applicant”; and
 - b) secondly, whether there was any jurisdictional error that affected the delegate’s decision.

3. It is necessary to determine both of those issues as the Court's jurisdiction only arises in respect of the delegate's decision if, the applicant was an "excluded fast track review applicant". The Court's jurisdiction under s.476 of the Act is only in respect of "migration decisions" and not in respect of decisions known as "primary decisions".

4. Section 476(4) of the Act sets out the meaning of a "primary decision" as follows:

primary decision means a privative clause decision or purported privative clause decision:

- (a) that is reviewable under Part 5 or 7 or section 500 (whether or not it has been reviewed); or
- (b) that would have been so reviewable if any application for such review had been made within a specified period; or
- (c) that has been, or may be, referred for review under Part 7AA (whether or not it has been reviewed).

(Emphasis in original)

5. A "fast track decision" is not reviewable either under pts.5 or 7 or s.500 of the Act: sub-ss.338(1)(d), 411(2)(c) and s.500(3).

6. A "fast track decision" is defined under s.5(1) of the Act to mean a decision to refuse to grant a protection visa to a *fast track applicant*, other than a decision to refuse to grant such a visa for a number of specified reasons not relevant here.

7. A "fast track applicant" is defined by s.5(1) of the Act to mean:

fast track applicant means:

- (a) a person:
 - (i) who is an unauthorised maritime arrival and who entered Australia on or after 13 August 2012, but before 1 January 2014, and who has not been taken to a regional processing country; and
 - (ii) to whom the Minister has given a written notice under subsection 46A(2) determining that subsection 46A(1)

does not apply to an application by the person for a protection visa; and

(iii) who has made a valid application for a protection visa in accordance with the determination; or

(b) a person who is, or who is included in a class of persons who are, specified by legislative instrument made under paragraph (1AA)(b).

(Emphasis in original)

8. An “unauthorised maritime arrival” is defined by s.5AA(1) of the Act as follows:

*(1) For the purposes of this Act, a person is an **unauthorised maritime arrival** if:*

(a) the person entered Australia by sea:

(i) at an excised offshore place at any time after the excision time for that place; or

(ii) at any other place at any time on or after the commencement of this section;

(b) the person became an unlawful non-citizen because of that entry; and

(c) the person is not an excluded maritime arrival.

(Emphasis in original)

9. A person entered Australia by sea, if amongst other things, “the person entered the migration zone except on an aircraft that landed in the migration zone”: s.5AA(2) of the Act.

10. The “migration zone” is defined by s.5(1) of the Act to mean the area consisting of the States, Territories, Australian resource installations and Australian sea installations. The applicant arrived by sea at Christmas Island on 13 July 2013¹. Christmas Island is an excised offshore place in the migration zone. That means that the applicant is an unauthorised maritime arrival.

¹ That is after the excision time in respect of Christmas Island which was 2:00pm on 8 September 2001 by legal time in the Australian Capital Territory.

11. On 2 September 2015, the applicant was given written notice under s.46A(2) of the Act determining that s.46A(1) did not apply to an application by him for a protection visa. The applicant consequently made a valid application for a protection visa in accordance with the determination. For that reason, the applicant was a fast track applicant within the meaning of s.5(1) of the Act.

12. Further, the decision of the delegate was to refuse to grant the applicant a protection visa and was not made relying on ss.5AH(2), 36(1B) or (1C) or sub-ss.36(2C)(a) or (b). For that reason, the delegate's decision was a fast track decision.

13. The next step in this legislative scheme would ordinarily be that the delegate's decision be referred to the Immigration Assessment Authority (IAA) under pt.7AA of the Act. Section 473CA provides:

The Minister must refer a fast track reviewable decision to the Immigration Assessment Authority as soon as reasonably practicable after the decision is made.

14. A "fast track reviewable decision" is defined under s.473BB of the Act to mean:

(a) *a fast track decision in relation to a fast track review applicant; or*

(b) *a fast track decision determined under section 473BC;*

but does not include a fast track decision in relation to which the Minister has issued a conclusive certificate under section 473BD.

...

15. Neither ss.473BC nor 473BD of the Act applies here. Thus, the question is whether the applicant is a fast track review applicant. A fast track review applicant is defined in s.5(1) of the Act to mean "a fast track applicant who is not an excluded fast track review applicant". In this rather convoluted way, we arrive at the first issue.

16. An "excluded fast track review applicant" means a fast track applicant:

(a) *who, in the opinion of the Minister:*

(i) *is covered by section 91C or 91N; or*

- (ii) *has previously entered Australia and who, while in Australia, made a claim for protection relying on a criterion mentioned in subsection 36(2) in an application that was refused or withdrawn; or*
- (iii) *has made a claim for protection in a country other than Australia that was refused by that country; or*
- (iv) *has made a claim for protection in a country other than Australia that was refused by the Office of the United Nations High Commissioner for Refugees in that country; or*
- (vi) *without reasonable explanation provides, gives or presents a bogus document to an officer of the Department or to the Minister (or causes such a document to be so provided, given or presented) in support of his or her application; or*
- (aa) *who makes a claim for protection relying on a criterion mentioned in subsection 36(2) in, or in connection with, his or her application, if, in the opinion of the Minister, the claim is manifestly unfounded because, without limiting what is a manifestly unfounded claim, the claim:*
 - (i) *has no plausible or credible basis; or*
 - (ii) *if the claim is based on conditions, events or circumstances in a particular country – is not able to be substantiated by any objective evidence; or*
 - (iii) *is made for the sole purpose of delaying or frustrating the fast track applicant's removal from Australia; or*
- (b) *who is, or who is included in a class of persons who are, specified by legislative instrument made under paragraph (IAA)(a).*

17. Here the delegate was of the opinion that sub-s.5(1)(a)(vi) of the definition of “excluded fast track review applicant” applied. He explained:

I find that the applicant has not provided a reasonable explanation for providing a bogus document in relation to his identity, nationality or citizenship. This is because, for the reasons outlined in my Findings of Fact, I do not accept the applicant is a stateless and undocumented Faili Kurd, and I find

that he is a person of Kurdish ethnicity and a citizen of Iran. In substantiating this finding, I note the discovery of the applicant's original Iranian driving licence bearing his biodata details, image, and a unique 10 digit national identity number which are only issued to citizens of Iran. Therefore, I am satisfied that [name] meets the definition of an excluded fast track review applicant in s 5(1) of the Act, for the reasons indicated above. ...

18. On the basis of that finding, the applicant was an “excluded fast track review applicant”. That means that he is not a “fast track review applicant”. For that reason, the decision by the delegate did not fall within s.473CA of the Act and was not referred to the IAA under pt.7AA of the Act. This means, in turn, that the delegate’s decision was not a “primary decision”, and that this Court has jurisdiction in respect of it.
19. The remaining issue is whether the delegate’s decision was affected by jurisdictional error. In order to determine that issue, it is first necessary to set out the relevant background to the delegate’s decision and then to summarise the delegate’s reasons for his decision.

Relevant background

20. The applicant arrived in Australia on 13 July 2013. He was subsequently granted a bridging visa and released from immigration detention. On 9 February 2014, the applicant was arrested for a criminal offence and his visa was cancelled. He was then returned to immigration detention.
21. On 2 September 2015, the Minister exercised his discretion to allow the applicant to make a valid application for a visa and the applicant was invited to apply for a Temporary Protection Visa (TPV) or a Safe Haven Enterprise Visa (SHEV). On 15 September 2015, the applicant made an application for a TPV. On 1 April 2016, the applicant lodged an application for a SHEV and on 28 April 2016 withdrew his TPV application.
22. The applicant claimed that he was a stateless and undocumented Faili Kurd from Iran. He claimed that he feared that this status and ethnicity would mean that he would be denied access to basic services. The applicant also claimed that he had converted to Christianity and while

he had not yet been baptised, his change in religion would put him at risk of persecution in Iran.

23. On 2 June 2016, the applicant attended an interview conducted by an officer of the Department of Immigration (**Department**) in relation to his SHEV application. At the interview the applicant was asked, amongst other things, about his nationality. In particular, he was asked why, when he first arrived in Australia, he had said that he was an Iranian citizen. The applicant said that he had only claimed that because he was told to.
24. On 26 September 2016, the Department wrote to the applicant about the Identity Card for Foreign Nationals relied on by the applicant to establish his claim to be a stateless Faili Kurd. The letter stated that the document had been assessed to be a bogus document and that this could mean that:
 - i) his visa application may be refused under s.91WA(1) of the Act; and
 - ii) he could be determined to be an excluded fast track applicant.
 - iii) The applicant was invited to comment on these matters.
25. The applicant's agents replied to the Department's letter on 5 October 2016. They wrote that the applicant had been given the identity document by his father and that he had always believed that it was genuine.
26. On 16 January 2017, the delegate made a decision to refuse to grant the applicant a SHEV.

Delegate's decision

27. The delegate found that the applicant was not a stateless Faili Kurd, but rather, that he was an Iranian citizen of Kurdish ethnicity. In this respect, the delegate relied on the fact that the applicant had submitted a bogus document to establish his identity and that after the applicant was arrested, an Iranian driver's licence was found in his possession. The driver's licence contained the applicant's biodata, image and a

unique 10 digit national identity number which are only issued to citizens of Iran.

28. On the basis of those findings, the delegate found that he was bound to refuse to grant the applicant a protection visa pursuant to s.91WA(1) of the Act. The delegate also found that the applicant was an excluded fast track review applicant.
29. The delegate also considered the applicant's protection visa claims. The delegate found that the applicant was not a credible, truthful or reliable witness because his evidence contained a number of inconsistencies and he showed a tendency to shift and tailor his evidence in a manner to achieve his own purpose.
30. The delegate set out, at some length, the bases for his credibility findings as well as his consideration of country information concerning the situations of Faili Kurds in Iran.
31. The delegate explained that, for those reasons, he did not accept that the applicant was a stateless and/or undocumented Faili Kurd but that he was a citizen of Iran, of Kurdish ethnicity, who had departed Iran lawfully on his own passport. The delegate then considered the applicant's claims concerning his conversion to Christianity.
32. The delegate was not persuaded by the applicant's evidence about the circumstances of his claimed conversion; or his personal motivation for converting to Christianity. The delegate accepted that the applicant had attended bible study sessions, had requested additional sessions and now attended once a week. He also accepted that the applicant had attended church services and stated:

As I am satisfied that the applicant has attended church services and bible study classes, and received visitors affiliated with the Jehovah's witnesses, solely for the reason of strengthening his claim for refugee status, I am disregarding these activities under subsection 5J(6) of the Migration Act 1958.

33. The delegate concluded that, in light of his "highly significant concerns about the applicant's credibility", he did not accept that the applicant had genuinely converted to Christianity and did not accept that the

applicant would be persecuted on account of his religion if he was returned to Iran.

34. The delegate accepted that the applicant would be returning to Iran as a failed asylum seeker.
35. The delegate then applied these findings to conclude that he was not satisfied that the applicant met the criteria for the grant of the SHEV in sub-ss.36(2)(a) and 36(2)(aa).
36. It may be noted briefly at this point that the delegate did not, on the face of his reasons, appear to distinguish between the two criteria when stating that he would not take into account the applicant's religious activities in Australia (see [32] above).
37. For those reasons, the delegate decided to refuse to grant the applicant a SHEV.
38. The applicant now seeks judicial review of the delegate's decision.

Consideration

39. The applicant raised three grounds:
 1. *I am Failsi Kurdish/stateless.*
 2. *I have converted to Christianity.*
 3. *Racial discrimination and ethnicity.*
40. Each of these grounds is an assertion directed to the question of whether the applicant satisfied the criteria for the grant of a SHEV. However, that question is reserved to the delegate.
41. Section 65 of the Act relevantly provides that, after considering a valid application for a visa, if the Minister (and in this case, his delegate) *is satisfied* that the applicant satisfies the criteria for the grant of the visa, he must grant that visa. If the Minister *is not so satisfied*, he must refuse to grant the visa. The question posed by s.65 of the Act is not whether the criteria for the grant of the visa are satisfied, but whether or not the Minister is satisfied that that is the case. Of course, that satisfaction must be formed according to law: *R v Connell; Ex parte Hetton Bellbird Collieries Ltd* (1944) 69 CLR 407 at 430; [1994] HCA

42 (Latham CJ); *Avon Downs Pty Ltd v Federal Commissioner of Taxation* (1949) 78 CLR 353 at 360; [1949] HCA 26 (Dixon J). Whether it is formed according to law is a question for the Court.

42. For those reasons, the applicant's grounds do not support the relief sought by the applicant and must be rejected.

43. At the hearing, an issue arose as to whether the delegate had fallen into error by applying its finding under s.5J(6) of the Act to criterion in sub-s.36(2)(aa) of the Act and, if so, what was the consequence of that error.

44. Section 5J(6) provides:

(6) *In determining whether the person has a **well-founded fear of persecution** for one or more of the reasons mentioned in paragraph (1)(a), any conduct engaged in by the person in Australia is to be disregarded unless the person satisfies the Minister that the person engaged in the conduct otherwise than for the purpose of strengthening the person's claim to be a refugee.*

(Emphasis in original)

45. The question whether a person has a well-founded fear of persecution is relevant to the criterion in sub-s.36(2)(a)², but not to the criterion in sub-s.36(2)(aa) of the Act. In that respect, its application is the same as its predecessor, s.91R(3): see *Minister for Immigration & Citizenship v SZJGV* (2009) 238 CLR 642; [2009] HCA 40. That means that, if the delegate failed to consider certain conduct which might be relevant to the criterion in sub-s.36(2)(aa) because it applied s.5J(6) of the Act, then it is at least arguable that he constructively failed to exercise his jurisdiction.

46. Leave was given to the parties to file further submissions dealing with that issue.

47. The Minister submitted first, that the delegate's finding about s.5J(6) of the Act, was independent of his conclusion that the applicant would not suffer persecution for reason of his religion. I do not accept that argument. While it is true as the Minister says, that the delegate's

² See s.5H and sub-s.36(2)(a) of the Act.

conclusion was based on his credibility findings, the fact is that the delegate expressly put out of consideration the applicant's religious activities in Australia. As those activities were clearly relevant to the genuineness of the applicant's conversion, or at least the prospect that he would continue to engage in similar activities in Iran, the delegate's conclusion was affected by its application of s.5J(6) of the Act.

48. Secondly, the Minister argued that, in his consideration of the sub-s.36(2)(aa) criterion, the delegate had expressly referred to the applicant's activities in Australia. The delegate said:

I am also satisfied the chance of the applicant facing the claimed significant harm as a result of any of his activities in Australia is remote.

49. I also reject that argument. As I have observed, the applicant's religious activities in Australia were relevant to the genuineness of his conversion. The delegate did not give separate consideration to that issue in respect of the criterion in sub-s.36(2)(aa) of the Act. Rather, the delegate's earlier conclusion informed his consideration of that criterion. Thus, even though he considered how the activities *in and of themselves* might affect the risk of significant harm in Iran, he did not take them into account in relation to the genuineness of conversion.
50. The Minister argued, in the alternative, that even if the delegate had wrongly applied s.5J(6) of the Act in determining the sub-s.36(2)(aa) criterion, there was no jurisdictional error. First, as the delegate had found that the applicant would not suffer persecution on account of his religion, his conclusion in respect of sub-s.36(2)(aa) could not have been different even if he had taken the applicant's religious activities into account. That argument is rejected for the same reasons as the Minister's earlier arguments: the finding about conversion was affected by the application of s.5J(6) of the Act. That finding was central to the delegate's conclusion about the applicant's religious claims.
51. The Minister's second alternative argument is that the delegate was under no obligation to consider the applicant's protection claims because he was bound to refuse the visa under s.91WA(1) of the Act.
52. I accept that argument.

53. In *Minister for Immigration & Multicultural Affairs v Yusuf* (2001) 206 CLR 323; [2001] HCA 30, McHugh, Gummow and Hayne JJ explained at [82]:

It is necessary, however, to understand what is meant by “jurisdictional error” under the general law and the consequences that follow from a decision-maker making such an error. As was said in Craig v South Australia, if an administrative tribunal (like the Tribunal)

“falls into an error of law which causes it to identify a wrong issue, to ask itself a wrong question, to ignore relevant material, to rely on irrelevant material or, at least in some circumstances, to make an erroneous finding or to reach a mistaken conclusion, and the tribunal’s exercise or purported exercise of power is thereby affected, it exceeds its authority or powers. Such an error of law is jurisdictional error which will invalidate any order or decision of the tribunal which reflects it.”

“Jurisdictional error” can thus be seen to embrace a number of different kinds of error, the list of which, in the passage cited from Craig, is not exhaustive. Those different kinds of error may well overlap. The circumstances of a particular case may permit more than one characterisation of the error identified, for example, as the decision-maker both asking the wrong question and ignoring relevant material. What is important, however, is that identifying a wrong issue, asking a wrong question, ignoring relevant material or relying on irrelevant material in a way that affects the exercise of power is to make an error of law. Further, doing so results in the decision-maker exceeding the authority or powers given by the relevant statute. In other words, if an error of those types is made, the decision-maker did not have authority to make the decision that was made; he or she did not have jurisdiction to make it. Nothing in the Act suggests that the Tribunal is given authority to authoritatively determine questions of law or to make a decision otherwise than in accordance with the law.

(Citations omitted)

54. Section 91WA(1) of the Act relevantly provides:

91WA Providing bogus documents or destroying identity documents

- (1) *The Minister must refuse to grant a protection visa to an applicant for a protection visa if:*
 - (a) *the applicant provides a bogus document as evidence of the applicant's identity, nationality or citizenship; or*
 - (b) *the Minister is satisfied that the applicant:*
 - (i) *has destroyed or disposed of documentary evidence of the applicant's identity, nationality or citizenship; or*
 - (ii) *has caused such documentary evidence to be destroyed or disposed of.*
- (2) *Subsection (1) does not apply if the Minister is satisfied that the applicant:*
 - (a) *has a reasonable explanation for providing the bogus document or for the destruction or disposal of the documentary evidence; and*
 - (b) *either:*
 - (i) *provides documentary evidence of his or her identity, nationality or citizenship; or*
 - (ii) *has taken reasonable steps to provide such evidence.*
- (3) *For the purposes of this section, a person provides a document if the person provides, gives or presents the document or causes the document to be provided, given or presented.*

55. There is no question, in this case, that the identity document was provided by the applicant for the purposes of the application for a SHEV: cf. *BGM16 v Minister for Immigration & Border Protection* [2017] FCAFC 72.

56. The question whether the document was bogus was a matter for the Minister. Although sub-s.91WA(1)(a) of the Act is not framed in terms of the satisfaction of the Minister, the definition of “bogus document” is framed in that way. Section 5 of the Act relevantly provides:

bogus document, in relation to a person, means a document that the Minister reasonably suspects is a document that:

- (a) purports to have been, but was not, issued in respect of the person; or
- (b) is counterfeit or has been altered by a person who does not have authority to do so; or
- (c) was obtained because of a false or misleading statement, whether or not made knowingly.

(Emphasis in original and added)

57. Reasonable suspicion of something is something less than actual belief of that thing, though it is more than mere conjecture or surmise: see *George v Rockett* (1990) 170 CLR 104 at 115 to 116; [1990] HCA 26. However, it remains open to the Court to examine the factual basis upon which the delegate concluded that he “reasonably suspected” the National ID document fell within one of the paragraphs of the definition of “bogus document”: *Sun v Minister for Immigration & Border Protection* (2016) 243 FCR 220 at [83]; [2016] FCAFC 52 (Flick and Rangiah JJ).

58. In *AIB16 v Minister for Immigration & Border Protection* [2017] FCAFC 163, Tracey, Mortimer and Moshinsky JJ said at:

89. ... *How a delegate decides whether a protection visa applicant has given a “reasonable explanation” for the provision of a bogus document will always depend on the particular factual circumstances before the delegate. ...*

...

91. *Without wishing to state the obvious, the provision requires there to be an explanation for the provision of a bogus document: that is, the narrative told must explain, and connect to, the provision of the bogus document. Second, the delegate must be satisfied the explanation is “reasonable”. The word reasonable connotes an explanation that is not fanciful, that is believable in the circumstances and which has sufficient rational connection to how and why the bogus document was provided. ...*

59. The evidence before the Court in this respect was not as complete as it might have been. There can be no criticism of this, however, because the issue was not one raised in advance of the hearing.
60. In his reasons for decision, the delegate explained at first, without more, that he had found the National Identity card to be a bogus document “under s 5(1) of the Act”. The reference to s.5(1) shows that the delegate was applying the definition of “bogus document” in that provision: that is, that he “reasonably suspected” one of the matters in the definition of that term.
61. The explanation for the conclusion is given later in the delegate’s reasons in the passage set out at [17] above. Critically, the delegate explains that one of the matters substantiating his conclusion, was that the applicant had been found in possession of an original Iranian driving licence “bearing his biodata details, image and a unique 10 digit national identity number which are only issued to citizens of Iran”. Clearly enough, the possession of such a document, is a reasonable basis for suspecting that a document which states that the applicant was a foreigner was either not issued in respect of the applicant or was counterfeit.
62. In light of that, and the fact that the delegate was not satisfied that the applicant had provided a reasonable explanation for providing the National ID card, s.91WA of the Act was engaged. The consequence of that engagement, is that the delegate was bound to refuse to grant the applicant a visa.
63. For that reason, even though the delegate’s decision was affected by error, I would, in the exercise of the Court’s discretion, refuse to grant relief: *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82 at [58]; [2000] HCA 57 (Gaudron and Gummow JJ); *SZBYR v Minister for Immigration & Citizenship* (2007) 81 ALJR 1190; [2007] HCA 26 at [29] (Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ).

Conclusion

64. The application will be dismissed.

I certify that the preceding sixty-four (64) paragraphs are a true copy of the reasons for judgment of Judge Smith

Date: 2 November 2017